NTSB Order No.
EM-140

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D. C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D. C.
on the 3rd day of February, 1987

PAUL A. YOST, Commandant, United States Coast Guard

v.

MARK DOUGHERTY, Appellant.

Docket: ME-121

OPINION AND ORDER

Appellant challenges a February 11, 1986 decision of the Vice Commandant (Appeal No. 2418) affirming a suspension of his merchant mariner's license (No. 59554) for three months on twelve month's probation. The suspension was ordered by Coast Guard Administrative Law Judge Rosemary A. Denson on April 24, 1985 following an evidentiary hearing on April 25, 1984.[1] The law judge had sustained a charge of negligence on a specification alleging that the appellant, while serving on February 8, 1984 as operator aboard the M/V JAMES E. NIVIN during an upbound transit of the Ohio River near Louisville, Kentucky, failed to operate that vessel "so as to avoid alliding with" the No. 6 mooring cell in the Louisville and Portland Canal. On appeal to the Board, appellant contends, inter alia, that the evidence of record establishes, without contradiction that notwithstanding the allision he exercised reasonable care in the navigation of his vessel.[2] For the reasons that follow, we agree and will, therefore, reverse the probationary suspension.

Essentially all of the evidence in this proceeding relating to the circumstances surrounding the allision was produced through the testimony of appellant and his witnesses, since the Coast Guard had rested its case after establishing the fact of the allision through documentary proof that was not disputed. The Coast Guard, although

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[1]Copies of the decisions of the Vice Commandant (acting by delegation) and the law judge are attached.

[2]The Coast Guard has filed a reply brief opposing the appeal.

it advanced no evidence to dispute the testimony to the effect that the accident was inevitable and that appellant's navigational judgements had been in no respect deficient, contends that the appellant's showing did not rebut the presumption of negligence the allision with the mooring cell created. Our review of the record persuades us otherwise.

Shortly after appellant's vessel was cleared to depart the McAlpine Lock to enter the canal channel, the lockmaster alerted appellant to the need for caution due to the presence of other traffic in the canal: an Army Corps of Engineers vessel, the M/V PATOKA, that was repairing a mooring cell located on the starboard, or Kentucky, side of the canal just beyond a bend it makes to the right (relative to appellant's direction of travel) and the M/V CITY OF LOUISVELLE, a vessel that was proceeding down the canal toward the lock and that, like appellant's vessel, was pushing a fleet of barges. The approximate dimensions of the NIVIN and the LOUISVILLE, with their tows, was about 105 ft. by 1000 ft.[3] Appellant and the LOUISVILLE agreed to a starboard-to-starboard passing which occurred at a point where the channel of the canal was about 500 ft. wide and where the PATOKA was positioned lengthwise along one side of the canal tending a cell not involved in this incident. While the necessity to accommodate the LOUISVILLE and the PATOKA had forced appellant to navigate along the far left side of the canal, in order to exit the canal, about a half mile (from the bow of appellant's flotilla) up the river from where the passing was completed (i.e. the sterns of the NIVIN and the LOUISVILLE clear of each other), he needed to bring his vessel first to starboard to transit the Conrail Railroad Bridge and then back to port to clear additional mooring cells along the right side of the river beyond the bridge.[4] Although there is no evidence that appellant's efforts to "shape up" the vessel for a safe passage under the bridge and past the cells were inappropriate in any way, the vessel was too slow to respond to his attempts to steer it away from the left bank to enable him to bring its bow to port in time to avoid striking the No. 6 cell.[5] The vessel's diminished steering responsiveness appears to be attributable to the drag effect caused by the vessel's proximity to the left bank

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[3]The M/V PATOKA'S dimensions are 44 ft. by 200 ft.

[4]The mooring cell appellant's vessel struck is about 600 ft. from the bridge.

[5]The vessel's speed during this maneuvering was "dead slow ahead" which amounted to about 2 knots. Neither the cell nor the vessel suffered significant damage.

and a reduction in maneuverability due to the relatively shallow water there.

In concluding that appellant had not rebutted the presumption of negligence the fact of the allision with the cell created, the law judge found that his failure to "properly align his tow so as to pass through the Conrail Bridge without striking the No. 6 protection cell [was] due to his own operational choices" (Decision at 7). While we agree with the law judge that the cell strike did occur despite appellant's "operational choices", all of the evidence in the record establishes that those "choices" were reasonable and prudent in the circumstances appellant confronted.[6] We therefore cannot agree that appellant failed to rebut the presumption. In our judgement, once appellant demonstrated that his navigation through the canal reflected the exercise of reasonable care, the presumption of negligence was overcome, and the Coast Guard could no longer rely on it to prove its case. Rather, at that point, the Coast Guard was obligated, if it differed with the testimony of appellant and his expert as to the propriety of appellant's navigational judgements or choices,[7] to put on evidence to counter appellant's showing. It made no effort to do so.

The Vice Commandant's contention that appellant did not rebut the presumption of negligence is based on the view that in order to establish that he exercised reasonable care, appellant had to demonstrate that "he could have taken no reasonable action to have prevented the allision" (Reply at 4). In this connection, the Vice Commandant asserts that appellant testified "he could have held if `right there where we met'", an observation the Vice Commandant treats as an admission that there was something else appellant reasonably could have done to prevent the allision.[8] The Vice

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[6]The Coast Guard conceded on brief that evidence establishing reasonable care is sufficient to rebut the presumption. It disagrees, however, that that standard was met here, as discussed infra.

[7]Appellant's expert, a licensed pilot and master for over 37 years, reviewed appellant's navigation of the canal in detail and concluded that appellant had no choice but to follow the course he had taken, that the appellant had no option but to be where he was at the point of passing, and that appellant had exercised prudence in maneuvering his vessel. See Tr. at pp. 131-33.

[8]In the same vein, the law judge had speculated that the appellant could have avoided the accident by "stopping his vessel [i.e. after the passing with the Louisville had been completed]

Commandant's point is not well-taken.

Appellant never testified that it would have been appropriate to "hold up" his vessel where the passing occurred or at any other place along the left side of the canal. Rather, in answer to a question from the law judge as to whether appellant could have held up his vessel at some point before coming abreast of the PATOKA (so that there would have been more room toward the center of the canal for the passing), appellant in effect explained that while holding up his vessel along that bank was not a viable option, the first opportunity he would have had to do so and not block the LOUISVILLE'S course to the lock was, in appellant's words, "right there where we met on the flat side of the river". See tr. at 96-97. In other words, appellant's testimony in this respect does not support the Vice Commandant's suggestion that there was some other reasonable course of action that appellant could have pursued to prevent the mishap. On the contrary, the only evidence in this record is to the effect that it would not have been prudent to attempt to hold up along the bank.[9]

As we conclude that appellant rebutted the presumption of negligence and that the Coast Guard produced no evidence of fault in appellant's management of his vessel, the appeal will be granted.

ACCORDINGLY, IT IS ORDERED THAT:

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and flanking to bring out his stern so he could then move his bow out to position the tow to go through the Bridge safely" (Decision at 10). The law judge's speculation in this regard is not only unsupported by the record, it is contrary to the evidence in the record on the inadvisability of attempting to stop the tow along the side of the canal where the passing took place, given, among other things, the unpredictability of the movement of the bow of the tow if efforts to slow or stop the vessel were undertaken in the shallow water. We recently had occasion to observe, in another case in which the same law judge had presided at the hearing on a charge of negligence, that the "law judge's theories and opinions as to what might have happened and how it might have been avoided are no substitute for, and do not constitute, evidence..." Commandant v. McDowell, NTSB Order EM-132, at pp. 6-7 (1986). The same observation holds true for decisions of the Vice Commandant that rest on conclusions and analysis for which there is no record support.

[9]Moreover, there is no evidence suggesting that appellant should have foreseen any necessity to hold up along the bank in order to shape up his vessel for the bridge transit.

1. The appellant's appeal is granted, and

2. The order suspending appellant's marine license is reversed.

BURNETT, Chairman, GOLDMAN, Vice Chairman, LAUBER and NALL, Members of the Board, concurred in the above opinion and order.